No. 21374

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ROGER LEE GLAVIN, ROBERT LORING CHESNEY,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

Appeal From the United States District Court,
Central District of California.

APPELLANTS' REPLY BRIEF.

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TOPICAL INDEX

TABLE OF AUTHORITIES CITED

Cases

Statutes

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Preliminary Statement.

As the Jurisdictional Statement, Statement of the Case, Specification of Errors and Summary of Argument was stated fully in Appellants' (Opening) Brief, the material herein will be confined to responding directly, point by point to the Argument set forth in Appellee's Brief.

ARGUMENT.

1. **The Instruction Given That the Jury May "Draw the Inference and Find" Guilt From Possession of Stolen Property Unless Defendants Explained Such Possession, Prejudicially Shifted the Burden of Proof to Defendants as to Their Innocence and Stripped Them of the Constitutional Guarantee That an Accused May Remain Silent and Suffer No Penalty Therefrom.**

The government's defense of this instruction—requested by the government and given by court over the objection of Appellants [Rep. Tr. p. 562, line 8 to p. 566, line 11]—seems to be that since the court did not use the word "presumption" (of guilt) the presumption of innocence is intact. The government urges that by such selectivity of language the rights of the accused are preserved.

This is sheer sophistry. How much stronger language could the court have used? He told the jury that they could "FIND" guilt unless the defendants explained possession. To say that they (the jury) have the right to "Find" guilt from this situation is even stronger than a presumption. It appears to be without limit. They are given carte blanche permission to disregard any presumption of innocence unless possession is explained.

The government counsel argue that the courts have long been aware of the difference between presumptions and inferences . . . and that an inference does not demand a conclusion . . . therefore, the defendants have not been harmed by the instruction, that from possession the jury may "DRAW THE INFERENCE AND FIND" guilt, unless defendants explain it.

Stripped of all the niceties and expressed in the blunt language of the common man, this instruction says to the jury that if the defendants do not tell you how they got connected with the stolen property you may find them guilty from this fact notwithstanding any Constitutional rights they might otherwise have had not to testify and suffer no detriment therefrom.

One who is to suffer an "inference of guilt" for exercising his constitutional right to remain silent is in effect denied that right.

While it is submitted that this instruction goes far beyond a mere "inference" when it licenses the jury to "FIND" guilt if possession is not explained, even an "*inference*" of guilt denies defendants their constitutional right to remain silent and suffer no penalty.

The instruction in *Bruno v. U.S.,* 308 U.S. 287, p. 292, 60 S. Ct. 198, 199, approved by the Supreme Court, while mentioning the word "presumption" clearly rules out that an "*inference*" may arise from the failure of a defendant to testify and forbids the jury to weigh such fact against a defendant.

> "The failure of any defendant to take the witness stand and testify in his own behalf, does not create any presumption against him; *the jury is charged that it must not permit that fact to weigh in the slightest degree against any such defendant, nor should this fact enter into the discussion or deliberations of the jury in any manner.*" (Emphasis added.)

What other source of explanation of possession could exist for Defendant Chesney—in whose hands the police and FBI thrust the tags and items from vehicles reported stolen (at a time when he was committing no offense . . . their purpose, apparently to use this as evidence to infer guilt)—except to testify? In this situation, if he elected to exercise the right guaranteed to him by the Fifth Amendment of the Constitution, not to testify, the jury was told (over strenuous objection) that it could from this fact (failure to explain) "*draw the inference and find*" guilt.

The court by this instruction—and the admission of this planted evidence—completely nullified any presumption of innocence and overruled the constitutional right not to testify and to suffer no penalty there-

from. Moreover, he shifted the "*burden of proof*" of innocence to the Defendants.

The same situation existed in the case of Mr. Glavin where the police and their civilian counterpart (using their presence and authority) first searched, then seized, then arrested for possession of a vehicle reported stolen. How could Glavin explain this situation to avoid the brand of an "inference of guilt" unless he gave up his constitutional right to remain silent? When he remained silent, the court told the jury he had a burden to explain and not having done so, they could infer and find guilt. Both the presumption of innocence and no penalty for not testifying went out the window, when the judge so instructed the jury.

In the case of *Helton v. U.S.* (CA Tex. 1955), 221 F. 2d 338, the Court stated, that in enacting 18 U.S.C. 3481, Congress,

> "recognized that implicit in the privilege against self incrimination is not only the right to remain silent, but more important, *the right not to have that very silence give rise to an inference of guilt.*" (Emphasis added.)

The United States Supreme Court in the recent case of *Griffin v. State of California,* 380 U.S. 609 (614-15), 83 S. Ct. 1229 (1233), makes clear that such an instruction as given by the court here advising the jury that they may draw an "*inference*" of guilt where the defendant remains silent is forbidden.

> "It is said, however, that the inference of guilt for failure to testify as to facts peculiarly within the accused's knowledge is in any event natural and irresistible, and that comment on the failure does not magnify that inference into a penalty for asserting a constitutional privilege. * * * *What the jury may infer, given no help from the court, is*

one thing. What it may infer when the court solemnizes that silence of the accused into evidence against him is quite another. * * *

We take that in its literal sense and hold that the Fifth Amendment, in its direct application to the Federal Government . . . forbids either comment by the prosecution on the accused's silence or *instructions by the court that such silence is evidence of guilt.*" (Emphasis added.)

The law does not impose on a defendant the duty to produce any evidence.

United States v. Schneiderman, 106 F. Supp. 906.

It is not proper for a court to draw attention by means of intimations on the failure of a defendant to testify.

United States v. Weir (C.A.N.C.), 348 F. 2d 453.

Where the court instructed the jury that there should be no inference from the fact that the defendants did not take the stand, then instructed the jury:

". . . but, by the same token, you can weight in your mind that fact that they did not with everything else heretofore said to satisfy you of their guilt."

this was held reversible error.

United States v. Ward (CCA 3rd), 168 F. 2d 226, p. 227.

Where the court instructed jury:

". . . and, though no unfavorable inference can be drawn from failure of accused to testify, yet this rule does not relieve him from satisfactorily accounting for possession of stolen property, either by his own or other testimony".

this was held to be reversible error.

State v. Rock (La.), 110 So. 482, 162 La. 299.

Lastly, in this point, the government has quoted on page 22 of their brief the general instruction given by the court that no inference of guilt may be drawn from the failure of the defendants to testify. It is respectfully submitted that this is overriden and contradicted by the *specific* and *detailed* instruction, of which the appellants complain (an instruction that even wove the evidence into its terminology.) With contradictory instructions, the jury certainly would follow that which was detailed, specific and which undertook to recount items in evidence.

It matters not how you view such instruction, its natural effect was to wipe out the presumption of innocence, shift the burden to defendants and penalize them for exercise of their right to remain silent. It was therefore prejudicial and reversible error.

2. Where Fact of Conflict Was Made Known to Court by Attorney Representing Two Defendants, Prior to Start of Trial, It Was Court's Duty to Appoint or Allow Obtaining of Other Counsel for One Defendant, and Forcing to Trial Represented by One Attorney Denied Each Defendant the Constitutional Right of Effective Assistance of Counsel.

The government argues in its brief that this was purely a matter of discretion with the court; that the Defendants had some burden of proof on this matter which they did not carry by a preponderance of the evidence, that the record shows no conflict of interest, and that the defendants were obviously guilty anyway. (So, in effect, what difference did it make.)

With all of these contentions appellants heartily disagree.

Before the trial started the Court was told:

> "Your honor, *it appears there may perhaps be a conflict of interests here.* I appear for both Mr. Roger Glavin and Mr. Chesney. *Mr. Glavin and I have not been able to agree on my representation, and he has indicated that he does not wish me to represent him.* I would therefore move the court at this time to be relieved of representing Mr. Glavin." [Supp. Tr. p. 2, lines 8-15.] (Emphasis added.)

The court did not inquire as to the nature of the items of conflict, he afforded no opportunity to disclose these (*which it is urged could only have been done to the court out of the hearing of the U.S. Attorney),* but summarily denied the motion and directed that we proceed to try the case! [Supp. Tr. p. 2, lines 16-23.]

It would have been a breach of the attorney's duty to his clients to have openly spread in the record—to the possible detriment of one or both of the clients—their difference of views regarding their connection with the transactions charged in the indictment. The proper procedure was followed, that is to advise the court of this possible conflict and disclose an *actual hostility of one defendant toward the attorney's representation.* If the court, in face of this, felt more facts should be given before ruling, the procedure would be to have a hearing outside the presence of the prosecution (which the defendants were prepared to present).

However, *the court did not challenge or dispute the existence of a conflict of interest* . . . (and from the record, might be said to have accepted it) but based his denial upon the fact that "these people are entitled to a speedy trial" that "we are here this morning ready to try this case" and the defendants should have had sufficient time to get whatever representation they desired.

Thus, the court, in the interest of some claimed expediency (he did not ask if we could have had counsel within the day) and regardless of conflict of interest ordered the two defendants to trial represented by the one lawyer—a lawyer whom one of the defendants—with the knowledge of the court—did not want to represent him.

That is the record. No burden of proof was required. It was not in the face of the record a matter of discretion with the court. It was a duty of the Court in his responsibility to protect the rights of defendants charged with crime to see that they have adequate assistance of counsel. That duty was breached and Appellants were both denied their constitutional rights to such assistance.

Faced with such a ruling what would any competent counsel do? He would not get up and argue with the Court. The court has in no uncertain terms made a ruling. Counsel, in respect for the court, must accede to the ruling and do his very best to represent both defendants.

It would be his duty, in such a situation, to shield each defendant, as far as possible from having this conflict come out in open where the jury may see it and perhaps prejudice one or both defendants. It would be his duty to be alert in the interest of each defendant and to compromise (but not openly) wherever the interests appeared to him to be opposed. By such compromise, he realized that in each instance he was not fully and adequately representing one or the other of the defendants. Such was the handling of this case. There was no other choice in the face of the Court's ruling!

The language in the case of *Glasser v. United*

States, 315 U.S. 60 (75-76), 62 S. Ct. 457 (467-8) is very apropos to the situation in this case:

> "There is yet another consideration. *Glasser wished the benefit of the undivided assistance of counsel of his own choice. We think that such a desire on the part of an accused should be respected. Irrespective of any conflict of interest the additional burden of representing another party may conceivably impair counsel's effectiveness.* * * *
>
> "The *right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial.* * * *
>
> "Of equal importance with the duty of the court to see that an accused has the assistance of counsel *is its duty to refrain from embarassing counsel in the defense of an accused by insisting or indeed, even suggesting that counsel undertake to concurrently represent interests which might diverge from those of his first client, when the possibility of that divergence is brought home to the court.*" (Emphasis added.)

As stated in *Porter v. U.S.* (5th Cir.), 298 F. 2d 461, 463:

> "The constitutional guarantee of effective representation is not present when the counsel is in a duplicitious position where his full talents as a vigorous advocate having a single aim of acquittal by all fair means, are hobbled or fettered or restrained by commitments to others."

See also, *McGuire v. U.S.,* 289 F. 2d 405. In the recent case of *People v. Crovedi* (Sept. 1966), 65 A.C. 197, 53 Cal. Rptr. 284, the California Supreme Court expressed the present rule on such matters:

> "Likewise, in cases involving the representation of multiple defendants by a single attorney, an ac-

> cused must be afforded reasonable opportunity for representation by retained counsel of his own choice whether or not a conflict of interest is shown. A diversity of interest in the sense of any factual inconsistency between the defenses advanced *is not the sole or necessarily the controlling consideration underlying the requirement that counsel for a co-defendant not be forced upon another defendant.* It is not necessary for (the defendant seeking independent representation) to show that he had some diversity of interest from (his co-defendant) * * *; entirely apart from any factually apparent diversity of interests (the defendant is) *entitled to the undivided loyalty and untrammeled assistance of his own counsel.*" (Citations.) (Emphasis added.)

As stated in *Holland v. Boles* (D.C.), 225 F. Supp. 863:

> "The constitutional infirmity inherent in proceedings conducted under such circumstances is not affected by the fact that the attorney with dual and irreconcilable loyalties is privately employed rather than court appointed."

Actually, as expressed in a California Appellate Court opinion in the case of *People v. Kerfoot,* 184 Cal. App. 2d 622, 7 Cal. Rptr. 674, it would be improper for an attorney representing defendants where a conflict does occur to disclose the facts of the same as this would violate his duty to preserve his client's confidence and would be contrary to Canon 37 of Canons of Professional Ethics of the American Bar Association.

The error committed by the court herein is clear beyond question.

3. The Planted Police Controlled Evidence Was "Fruit From the Poisonous Tree" and Should Not Have Been Admitted.

The government takes a different view of the evidence on this matter than do the appellants. However,

there can be no quarrel that the following are facts, clearly shown in the record.

(1) The police and F.B.I. had physical possession of Exhibits 14-B thru 14-I (truck license plate, manila envelopes and small metal ID tags from a truck) from late afternoon until sometime after ten o'clock at night, photographing and marking them at the police lab for two or three hours. [Tr. p. 463, lines 1-5; p. 485, lines 1-5; p. 490, line 25, to p. 491, line 3; p. 503, lines 3-5; p. 512, lines 1-18; p. 514, lines 2-6.]

(2) These exhibits were then placed in the hands of the agent for the police. Mr. Buehler under a plan which the police had set up with Mr. Buehler to contact Mr. Chesney, to arrange to meet with him, to place the same in the hands of Mr. Chesney and simultaneously arrest him. [Tr. p. 485, line 1, to p. 486, line 15; p. 487, line 19, to p. 488, line 4; p. 513, line 14, to p. 519, line 25.]

(3) There was no evidence that Mr. Chesney had ever seen the exhibits before and he did not open the envelopes containing them prior to his arrest. [Tr. p. 473, lines 1-9; p. 519, lines 20-25.]

(4) At the time of arrest Mr. Chesney was committing no offense.

It is obvious, therefore, that at all times the police had the evidence in their possession and control, if they believed that Mr. Chesney had committed a felony (based on their 3 to 4 hours of examining the exhibits) they could have obtained a warrant for his arrest or they could have arrested him on some charge which they believed to be supported by the exhibits they had.

However, that was not their purpose. Their purpose was to plant that which they had already in their possession and had photographed and marked, into the colorable possession of Mr. Chesney (of material he

never had seen) and arrest him simultaneous SO THAT THEY COULD USE SUCH PLANTED POSSESSION AS EVIDENCE FROM WHICH A JURY WOULD INFER GUILT.

Couple this "illegal" police action with the instruction given by the Court (over objection) that guilt could be inferred from possession, and it is clear that the defendant's constitutional rights have been effectively circumvented.

The government argues that the police were no more than alert bystanders, watching the "shots" called by Chesney. Such is not the fact. The evidence is to the contrary.

Mr. Buehler delivered the bag containing the exhibits which he had gotten from a third party to the police at their direction. The police and FBI then took the material and spent three or four hours at the police lab photographing and marking the same. The police then delivered the material back to Mr. Buehler, set up a prearranged plan with him and instructed him to contact Mr. Chesney.

Mr. Chesney had already gone home and retired and it was Mr. Buehler, at the police direction, that brought Mr. Chesney to the prearranged location where the planting of the poisonous fruit was accomplished by the police.

The police officer who testified as to the arrest and as to the exhibits was asked if he had suggested to Mr. Buehler that he call Mr. Chesney and after some stalling the court asked him directly, . . . "did you tell Buehler to call Chesney" after which the officer said "Yes sir" and stated . . . "To the best of my recollection, I told him to proceed with the original plan." [Tr. p. 513, lines 3-24.]

The police told Mr. Buehler to proceed to the location. [Tr. p. 515, line 21.]

Thus, this was not an arrangement which was initiated by Chesney. The program initiated by Chesney had fallen through due to police intervention. It was the police and the police alone who initiated this meeting so that they could "plant" these items never seen by Mr. Chesney on Mr. Chesney and simultaneously arrest him therefor so that the same could be used as evidence to infer guilt.

By such "police state" methods, police suspicions coupled with police action are converted into "evidence" without any foundation or basis. When this activity is followed, as in this case, by the intervention of the Court stating to the jury that unless the defendant explains that "possession" (and in effect waives his privilege not to testify) they may "find" him guilty, the fundamental precepts of fair play are destroyed and the Constitutional rights of the defendants obliterated.

As it is clearly established that an arrest may not be used as a pretext to search for evidence (*United States v. Lefkowitz,* 285 U.S. 452, 467, 52 S. Ct. 420, 424; *People v. Haven,* 59 Cal. 2d 686, 31 Cal. Rptr. 47) certainly by the same reasoning an arrest cannot be used as an incident to and as a pretext for tying one into police possessed and controlled evidence.

The government claims in its brief that appellants cannot make mention of the fact that the arrest was illegal because they contend that there was not a specific objection on this ground at the trial. They cite in support of such contention the case of *Toland v. U.S.,* 365 F. 2d 304. The case does not so hold.

In the *Toland* case there was no objection of any kind made at time of trial and error was claimed for the first time on appeal. In the present case strenuous objection was made and repeated throughout the trial in the broadest form that it could possibly be done.

Such exacting technicalities are not favored in the modern jurisprudence procedure.

The objection was made upon the ground that there was not sufficient foundation that it actually was an entrapment procedure that the police had set up, that the evidence was therefore irrelevant and immaterial. [Tr. pp. 491, 492, 493 and 494.]

Thus, it was clearly brought to the court's attention that the planting of evidence and simultaneous arrest of Mr. Chesney was improper and afforded no foundation for an introduction of the evidence.

The government argues that the police were arresting based on a reliable informant and were merely intercepting.

As pointed out above, this is not a fact as Mr. Buehler was acting at all times after the material which he had gotten from a third party had been photographed by the police, under the direction and control of the police. It was at the police direction that he made the arrangements. The police, therefore, planned, controlled and supervised the whole arrangement and the arrest was merely a pretext to use the exhibits which otherwise had no foundation, in evidence against Chesney. Is an illegal act by the police to be judged by a different standard than those of others?

4. As the Search of the Vehicle in Which Defendant Glavin Was Riding Was Exploratory and Preceded the Arrest the Motion to Suppress Should Have Been Granted.

The government has devoted its reply on this point primarily to a recitation of some of the highlights of statements of their witnesses only. The facts stated by Roger Lee Glavin in his affidavit to support such motion and the items in the testimony of the government's witnesses which support such statements have been passed by.

The affidavit of Mr. Glavin in support of the motion to suppress [Clk. Tr. p. 14] points out that when the truck in which he was riding driven by Mr. Rexus pulled into a weight station in Ventura County for a

routine check that the Highway Patrol motioned the vehicle to a parking area away from the scales and weight station and that the officers instructed Glavin and the driver to get out of the truck, to produce the vehicle registration and to stand apart from the vehicle.

At this time the officer and individual under their jurisdiction started an intensive and detailed examination of the trailer and the truck getting under the trailer with a wire brush and brushing off with a steel wire brush areas of the frame of the trailer and used the wire brush underneath the truck also brushing away material on the two rear axels apparently searching for numbers or identification marks of some kind.

This procedure was then followed to the area underneath the transmission with the Police standing beside this man checking and brushing off areas around the transmission. The individual then took his notebook and wrote something down and then appeared to go to a telephone booth to make a phone call and then returned to the vehicle and began to examine it further.

The officers then instructed Mr. Glavin to raise the cab of the truck which Mr. Glavin did. An examination was then made of the engine and the fuel pump utilizing the steel brush as before.

This was followed by an examination of the front axel brushing off and writing down serial numbers from the axel. The individual who was under the police direction then left for a moment and returned with a can of what appeared to be paint remover and a rag. This was applied to the frame of the truck and after applications the paint in the area where this had been applied did raise up and after several applications it was removed.

The officers were called over to examine this and to look at it and also to photograph it. Following this, Mr. Glavin was directed to lower the cab.

The police and the individual under their control then searched the interior of the truck cab and removed therefrom all papers, documents, lists and items which belonged to Mr. Glavin including the removal of his suitcase and searching it.

Included among the items removed were receipts for fuel purchase, tickets, cash fuel receipts and a statement made by Mr. Glavin to an insurance company in El Paso, truck leases, driver's logs, telegrams, permits and some papers with the truck manufacturer's assembly parts list. A few minutes following this search, the police officers announced that Mr. Glavin and Mr. Rexus were under arrest.

As pointed out in the opening brief, the officer admitted on cross-examination that the information upon which he made the arrest was that Mr. Ross who was searching the vehicle under his surveillance showed him the brass plate in the cab which corresponded to a number he had in a notebook. [Rep. Tr. p. 284, lines 12-17.]

This clearly corroborates the statement of Mr. Glavin of the exploratory search and the arrest which followed as a result of the fruits of such illegal search.

The cases as cited in appellants' opening brief clearly points out that such a procedure is not permitted and that an arrest is not justified by what a search discloses.

Henry v. United States, 361 U.S. 98, 80 S. Ct. 168.

5. The Admission Without Foundation of Hearsay Documents Against Defendant Chesney Was Prejudicial Error.

In its attempt to show this court that there was some remote foundation for the introduction of the hearsay documents [Ex. 9A and Ex. 12E] against defendant Chesney, the government in reviewing this transaction has not fairly stated the evidence. Moreover, that which they have stated does on its face disclose error by the court.

The Exhibit 9A which appeared to be a receipt for the purchase of truck parts having the name of "Chesney Truck" on it had no foundation for its use against Mr. Chesney. It was not established by any separate or other evidence that the name "Chesney" referred to thereon was the defendant herein. Apparently, the only reason the court left it in was that it bore a name—without other connection—which happened to be the last name of defendant Chesney.

The government states that counsel for the appellant admits that this document was established by some foundation as being from Chesney's firm. Such is not the fact. The statement referred to is taken out of context and only upon reading the whole argument presented by counsel for appellants can the true effect of the statement be seen.

The court had just commented that he was going to admit this and that Chesney could rebut it if he wished and had said something about this is a transaction from Chesney's firm [Tr. p. 338 commencing on line 16].

Counsel for the appellant replied to the court on the court's own assumption that it was established as being from Chesney's firm and then went on to state that Chesney runs a manufacturing plant and that the name

on this paper was not Chesney's name and that it would indicate to appellant because his knowledge of Chesney's firm that it was not by Chesney because Chesney's firms were Chesney, Inc., and Chesney Tool and Engineering, Inc. That, therefore, there was no establishment that the term "Chesney Truck" related to this Chesney. [Rep. Tr. p. 342, lines 9-18.]

As pointed out to the court anyone could use another's name or use a name which embodied the surname of any person and unless some foundation were laid to show that Defendant had such a firm or that Defendant in fact had used such a name, to admit in evidence such a paper not obtained from such a defendant, was prejudicial error.

The government in attempting to show some connection between Chesney and the transaction relating to the truck and to show a connection or foundation for the introduction of Exhibits 12E (gasoline receipts charged to a credit card account bearing the name of Robert L. Chesney) referred to testimony of Mr. William West who had testified of talking to Mr. Chesney and Mr. Leon Glavin about renting a shop from him.

What the government did not bring out and what it did gloss over was that Mr. Chesney had spoken to him about the possibility of three phase power in the place not being enough to operate machinery and welding equipment, that Mr. Chesney had told him that he was interested in putting in a welder and some machinery and the place would have to have sufficient power to carry them.

This testimony is consistent with Mr. Chesney's manufacturing business and certainly shows that Mr. Chesney's connection with the transaction is not tied

up sufficient to find a basis for introducing these gasoline tickets taken from Mr. Roger Glavin's truck and not shown that such gasoline credit card was that of Mr. Chesney or that it was used with his knowledge or permission or consent.

The government mentioned an item which it is contended also was error, *i.e.*, that after the conversation between Mr. Leon Glavin and Mr. Chesney and Mr. West that Mr. Leon Glavin later returned and out of the presence of Mr. Chesney told Mr. West that he and Mr. Chesney *were partners in a business,* that they had another tractor which Mr. Glavin's brother was driving and that they had bought two trucks new. [Rep. Tr. p. 390, line 15, to p. 392, line 14.]

There was strenuous objection made to this testimony (and a motion to strike) it being pointed out to the court that proof of partnership or agency cannot be proved by extrajudicial expressions or any expressions of an agency outside of the hearing of or outside of the other agent or so-called principal, that it would be hearsay. [Tr. p. 389, line 4, to p. 391, line 15.]

The court, nevertheless, overruled this objection and admitted the evidence without any foundation and now the government seeks to rely upon this improperly admitted evidence as showing some basis for connection with Mr. Chesney on which to rest the foundation for the admission of the Exhibits 9A and 12E.

The declaration of one person made out of the presence of another as to the fact of partnership between him and that other person is inadmissible. *Easterly v. Bassignano,* 20 Cal. 489, *Vanderhurst, etc. v. DeWitt,* 95 Cal. 57, 30 Pac. 94, *Selinas v. DeWitt,* 97 Cal. 78, 31 Pac. 744.

Thus, the sought for connecting foundation is itself incompetent and the error is merely compounded. No foundation existed for the introduction of these documents against appellant Chesney and the court erred in so admitting them.

Conclusion.

It is respectfully submitted that the instruction given by the court that the jury could find guilt from possession of stolen items unless explained by defendants overruled their presumption of innocence and deprived them to their right to remain silent and suffer no penalty therefrom; that the court in forcing the two defendants to proceed to trial represented by a single attorney when advised that there appeared to be a conflict of interest and that one of the defendants did not wish such counsel to represent him denied to both appellants the effective assistance of counsel guaranteed by the Sixth Amendment; that the admission of a police controlled evidence which was planted by the police under a ruse wherein an arrest was used as a pretext therefor was prejudicial error; that as the evidence obtained from the truck in which Mr. Glavin was riding was found as a result of an exploratory search prior to arrest and arrest resulted from such search, the motion to suppress should have been granted and the evidence not admitted; and, the admission without foundation of the hearsay documents [Ex 9A and Ex. 12E] against Mr. Chesney was prejudicial error so that the judgments of conviction in this matter should be reversed and appropriate relief granted.

Respectfully submitted,

G. G. Baumen,
Attorney for Appellants.

Certificate.

I certify that in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

G. G. Baumen,